YALE LAW JOURNAL

Published monthly during the Academic Year by the Yale Law Journal Co., Inc.
Edited by Students and members of the Faculty of the Yale School of Law.

SUBSCRIPTION PRICE, $3.00 A YEAR **SINGLE COPIES, 50 CENTS**

Canadian subscription price is $3.50 a year; foreign, $3.75 a year.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

AGAIN THE LAST CLEAR CHANCE DOCTRINE

Excluding the obvious case of negligent conduct on the defendant's part followed by the plaintiff's later act of negligence (as where a plaintiff "riding very hard" at dusk negligently ran into and was injured by a pole which the defendant had negligently left in the highway)[1] the cases that come within the doctrines of "contributory negligence" and "last clear chance" fall naturally into four classes.

(1) The plaintiff by his negligence has placed himself (or his property)[2] in a position of helpless peril from which in all likelihood

[1] *Butterfield v. Forrester* (1809) 11 East, 60 "If [the plaintiff] had used ordinary care, he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault." Per Bayley, J.

[2] These rules apply, apparently with equal force, to injuries to property as well as to personal injuries. In fact the parent case on the subject, *Davies v. Mann* (1842) 10 M. & W. 546, involved the death of the plaintiff's donkey. For the sake of simplicity the propositions as stated cover only personal injuries, although a few of the cases cited in the following notes involved injuries to personal property.

he cannot even at the last moment extricate himself. The defendant has notice of such peril in time, by the exercise of care, to avoid injury to the plaintiff. Here it is well settled that the defendant's negligent failure to use care to avoid the collision makes him answerable in damages for the ensuing harm suffered by the plaintiff.[3]

(2) The plaintiff could by the use of care remove himself from the position of peril in which he has negligently placed himself, but he (negligently) remains unconscious of his peril. The defendant has notice of the plaintiff's peril and of the plaintiff's unconsciousness thereof in time, by the use of care on his (defendant's) part, to avoid the injury to the plaintiff. Here it is generally agreed that the defendant's failure to use care to avoid the collision makes him chargeable for the plaintiff's harm.[4]

(3) The plaintiff as in the first class has negligently placed himself in a position of helpless peril from which he probably cannot even at the last moment extricate himself. The defendant is not aware of plaintiff's peril, yet by using due care he could have discovered it in time to enable him, by the use of care, to avoid the injury to the plaintiff. Here the great weight of authority allows a recovery by the plaintiff.[5]

(4) The plaintiff as in the second class has by his negligence placed himself in a position of peril, from which, however, he could by the

---

[3] This proposition is now unquestioned. Many of the authorities are collected in 1 Shearman & Redfield, *Negligence* (6th ed. 1913) sec. 99, note 248.

[4] "The conclusion that one conscious of danger of serious injury to a human being if he persists in the course which he is pursuing, which he can prevent by care, should be discharged from responsibility because of negligent ignorance of the danger in the person injured, is so fundamentally unjust and contrary to natural reason that few cases are to be found that carry the logic of the rule of contributory negligence to that extent. With substantial unanimity, recovery is permitted in such cases, either upon the ground that the lack of attention in the party injured is not the proximate cause of the injury, or that the failure of the trainmen to act under such circumstances so far partakes of the nature of a wanton or intentional wrong that the law as to contributory negligence has no application. . . . It may be that neither explanation is strictly logical, and that the real foundation for the rule is merely its fundamental justice and reasonableness." *Cavanaugh v. Boston & Maine R. R.* (1911) 76 N. H. 68, 72, 79 Atl. 694, 696. See also *Gunter's Adm'r v. Southern Ry.* (1920, Va.) 101 S. E. 885, 894, (1920) 29 YALE LAW JOURNAL, 697.

[5] *Teakle v. San Pedro etc. R. R.* (1907) 32 Utah, 276, 90 Pac. 402; *Nicol v. Oregon, Washington R. & Nav. Co.* (1912) 71 Wash. 409, 128 Pac. 628; *contra, Bourrett v. Chicago & N. W. Ry.* (1911) 152 Iowa, 579, 132 N. W. 973. See also *Starck v. Pacific Electric Ry.* (1916) 172 Calif. 277, 156 Pac. 51. Of course there must be a duty resting on the plaintiff to use care to discover the plaintiff's presence. See *Teakle v. San Pedro, etc., R. R., supra.* Some of the decisions denying a recovery can be explained on the ground that the plaintiff was a trespasser to whom no such duty was owing. The same explanation is applicable also to cases where a railroad train has run into trespassing cattle. See 36 L. R. A. (N. S.) 957, note.

use of care at the last moment extricate himself. The defendant, had he used care, could have discovered the plaintiff's peril and could have avoided the ensuing injury to him. Here almost all courts deny a recovery.[6] Missouri and perhaps a few other jurisdictions allow a recovery under what is called the "humanity doctrine."[7]

It is obvious that in the cases belonging to the first of the four classes here enumerated the defendant, and the defendant only, had the last clear chance to avoid the harm which the plaintiff has suffered. In the second class it is in a sense correct to say that the defendant alone had the last clear chance, since in the form in which the situation is presented to the defendant, it must necessarily be clear to him that he alone can avoid the collision.[8] In the third class it is plain that the defendant alone had the last clear chance, although he was not aware of it. In the fourth class it is equally plain that neither party had the sole last chance of avoiding the harm to plaintiff, because by hypothesis if either of them had used care at the last moment the harm to the plaintiff would not have occurred.

Testing the several situations by the doctrine of proximate cause,[9] which is the test usually applied in the decisions, it is evident that as between the parties the defendant's negligence was the more proximate cause and the plaintiff's a relatively more remote cause in the first three classes; whereas in the last class, the negligence of the defendant and that of the plaintiff being concurrent, each necessarily contributed as one of the several proximate causes of the injury.

Viewing the four situations in the light of the rule of policy that a person should not be permitted to recover damages for the consequences of his own negligence (either because wrongdoers should have no standing in court with respect to the results of their own

---

[6] *Dyerson v. Union Pac. R. R.* (1906) 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 133, with valuable note; *Wilson v. Illinois Central R. R.* (1911) 150 Iowa 33, 129 N. W. 340; *Wabash Ry. v. Tippecanoe Loan & Trust Co.* (1912) 178 Ind. 113, 98 N. E. 64.

[7] *Taylor v. Metropolitan Street Ry.* (1914) 256 Mo. 191, 165 S. W. 327. The statutory rule which prevails in some states as to comparative negligence where a person is run down by a railroad train, would often allow a recovery in a case falling under class four. See note 12, *infra*.

[8] This point is clearly brought out in 7 L. R. A. (N. S.) 132, 139 note.

[9] It should be noted that the term proximate cause is given a somewhat narrower meaning than usual in cases between a negligent plaintiff and a negligent defendant. Had a non-negligent stranger X been injured by the collision in any of the four cases above enumerated, X could doubtless maintain action against either of the two negligent parties. *Lane v. Atlantic Works* (1872) 111 Mass. 136. Professor Bohlen has pointed out that at the time the earliest cases of contributory negligence were decided the earlier of the two wrongdoers would have been excused from responsibility to X on the ground that there had intervened the wrongful conduct of another human being, as in *Vicars v. Wilcocks* (1806) 8 East, 1. See Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233, 236.

wrongdoing,[10] or because of a belief that to impose such a prohibition will result in a more complete observance of a high standard of care by members of the community generally)[11] at first glance it would seem that a recovery should be denied to the plaintiff under all of the above circumstances. Yet this policy must in certain circumstances yield to the more important policy of safeguarding life and limb, as well as valuable property. Hence in the first and second classes and probably in the third class, sound public policy would appear to justify a recovery of damages by the plaintiff.

As to the fourth class it is not easy to decide which of the two rules of policy should prevail. Indeed we are here confronted with the inherent weakness of the whole doctrine of contributory negligence, namely, that the common law makes no effort to apportion the blame or even to divide the loss between two parties who are guilty of concurrent negligence. Seemingly the now discarded doctrine of comparative negligence which once prevailed in Illinois,[12] as well as the many provisions to the same effect found in our recent workmen's compensation acts and employers' liability acts, are attempts to mitigate the harshness of the common-law doctrine which holds that a plaintiff whose negligence has at the last moment concurred with defendant's negligence in producing the injury, shall be precluded from obtaining from the defendant any compensation whatever, irrespective of the relative fault of the two parties and of the relative loss suffered by the two in consequence of their concurrent negligence. The hardship worked by the common-law rule upon a plaintiff seems particularly glaring where the defendant is negligent in the operation of a machine which is capable of doing great harm if mismanaged, such as a locomotive, a train, a street car, or an automobile, and it is with respect to such situations that we find the occasional decisions which have broken away from the general rule of contributory negligence. Even though the last chance to avoid the harm may have been as much within the plaintiff's control as within the defendant's, yet the dictates of humanity are said to impose responsibility for the plaintiff's harm upon the offending operator of the dangerous machine. However faulty may be the logic of these decisions, and obviously they lean too far in the plaintiff's favor even as the more general rule may be thought to go too far in the defendant's favor, they have the support of whatever analogy may be found in the statutes above referred to, which are

---

[10] See *Davis v. Guarnieri* (1887) 45 Oh. St. 470, 479; Schofield, *Theory of Contributory Negligence* (1890) 3 HARV. L. REV. 263, 268-270; Bohlen, *op. cit.*, 256.

[11] *Ibid.*

[12] *Galena & C. U. R. R. v. Jacobs* (1858) 20 Ill. 478. The doctrine of comparative negligence has been established by statute, so far as concerns actions against railroads, in Florida, Georgia, and Wisconsin. See (1911) 9 MICH. L. REV. 444.

designed to protect an employee against damage suffered in the course of a more or less hazardous employment.

An interesting variation upon the humanity doctrine is announced by the recent Connecticut decision of *Tullock v. Connecticut Company*[13] where the court held the defendant liable for the negligence of its employees in failing to discover the plaintiff's intestate upon its track, although such intestate could up to the last moment have saved himself from harm by simply stepping off the track. The court in so deciding approved the distinction laid down by way of *dictum* in the case of *Nehring v. Connecticut Company*[14] that where the plaintiff has negligently placed himself in a position of peril, the means of escape being open to him by the exercise of reasonable care, the defendant is responsible for negligently failing to discover the plaintiff in time to avoid doing him harm, provided the plaintiff remained passive in his position of peril; but that if the plaintiff had continued as an active agent in producing the circumstances under which his injury was received down to the time of its occurrence, or at least until it was too late for the defendant, had he known of the plaintiff's peril, to have saved him, then the plaintiff's conduct is to be deemed a part of the efficient cause of his injury and bars his recovery.

This view seeks to subdivide the fourth class of cases in the foregoing enumeration, holding the defendant responsible for a negligent failure to discover the plaintiff's position of peril even though the plaintiff at the last moment could have escaped therefrom, provided the plaintiff remained passive, but denying a recovery where the plaintiff's active negligence continued up to the last moment.[15]

Further experience alone can tell whether this distinction can be maintained as a practical working rule. It is believed that the underlying reason for it is an endeavor to give some relief to a plaintiff who is negligent at the last moment, without going the full length of the Missouri doctrine. In short it is another one of the many attempts which are being made to reach a fair compromise in cases of contributory negligence.[16]

---

[13] (1920, Conn.) 108 Atl. 556.

[14] (1912) 89 Conn. 109, 84 Alt. 301, 45 L. R. A. (N. S.) 896. It should be noted that in the *Nehring* case there was a vigorous dissenting opinion in favor of allowing a recovery whether the plaintiff's conduct at the last moment was active or passive.

[15] Perhaps the recent English decision of *Ellerman Lines, Ltd. v. H. & G. Grayson* (1919, C. A.) 121 L. T. R. 508, discussed in (1920) 29 YALE LAW JOURNAL, 542, 580, may be explained on this distinction between active and passive negligence on plaintiff's part.

[16] The provision of the Constitution of Oklahoma that the defence of contributory negligence "shall in all cases whatsoever be a question of fact and shall at all times be left to the jury" (art. 23, sec. 6) doubtless operates to enable a plaintiff to recover for a defendant's negligence despite the plaintiff's own concurrent negligence.

It is a matter of regret that the limitations of our system of trial by jury prohibit, or are considered to prohibit, an investigation into the relative fault of the plaintiff and of the defendant, and also into the relative harm suffered by each. The rule applied in courts of admiralty[17] and in the civil courts of France,[18] Germany,[19] and some other European countries, reaches certainly a more satisfactory result than we generally do under our common-law rules as to contributory negligence and last clear chance.

E. S. T.

INJURY BY THE VOLUNTARY ACT OF A STRANGER UNDER THE WORKMEN'S COMPENSATION ACTS

The case of *Munro v. Williams* (1920, Conn.) 109 Atl. 129, recently decided by the Connecticut Supreme Court of Errors illustrates the use of fiction[1] to arrive at a commendable result under the Workmen's Compensation law, with the consequent obscuring of the true effect of the decision in extending the law. In that case, the claimant was the caretaker of his employer's grounds, his duties including the ordinary repair of structures on the grounds and the protection of property generally. There were some mischievous youths in the neighborhood shooting air rifles who, spotting him at work laying a brick walk in front of a building in which there were windows on all sides, shot in his general direction in order to get him to run after them. After duly driving them away as was his duty to protect the glass, he resumed his work on the walk. The boys, however, soon returned and again fired, striking him in the eye. The court awarded compensation, holding that "the claimant on the resumption of his former work, laying the walk, was still acting in his capacity as guardian against intruders and trespassers and as general protector of the property, differing in this respect from the ordinary employee engaged simply to lay brick." It seems clear that the true effect of the decision is to award compensation to an employee for an injury received from the mischievous conduct of a stranger, merely because such an injury is incidental to another duty of that employee, in which he was not engaged at the time of the injury.[2] But it is ordinarily

[17] *The Max Morris* (1890) 137 U. S. 1. 11 Sup. Ct. 9; *The Lackawanna* (1907, S. D. N. Y.) 151 Fed. 499.

[18] 2 Planiol, *Traité Elémentaire de Droit Civil* (6th ed. 1911) sec. 899.

[19] German Civil Code, sec. 254.

[1] For the use of fiction generally, see Smith, *Surviving Fictions* (1917) 27 YALE LAW JOURNAL, 147, 317.

[2] The court stresses the duty to drive the boys away; not the fact that he had already once chased them. The indication is strong that recovery would have been permitted even though he was struck by the very first shot.